IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1115

In the Matter of the Petition of

ROBERT M. LALLI,

Appellant,

to compel

ROSAMOND LALLI, as Administratrix of the Estate of Mario Lalli, Deceased,

Appellee,

to render and settle her account as Administratrix.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

JURISDICTIONAL STATEMENT

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CITATIONS

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ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant appeals from the final judgment of the Court of Appeals, State of New York, entered on November 17, 1977, affirming on reconsideration ordered by this Court the decree of Surrogate's Court, Westchester County, dismissing the petition for a compulsory accounting and adjudging that Estates, Powers and Trusts Law § 4-1.2 is constitutional and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

Opinion Below

The opinion of the Court of Appeals of New York on reconsideration is reported at — N.Y.2d — (Appendix A). The prior opinion of the Court of Appeals is reported at 38 N.Y.2d 77. The opinion of the Surrogate's Court of Westchester County is not reported (Appendix B).

Jurisdiction

This proceeding was commenced in the Surrogate's Court of Westchester County for a compulsory accounting by administratrix-widow on behalf of his sister and himself by decedent's son, who was born out of wedlock, without an order of filiation being granted within two years after birth and who was acknowledged as son by the decedent in a writing acknowledged before a notary and partially supported by the decedent during his lifetime. The Surrogate dismissed the proceeding and adjudged that the statute, Estates, Powers and Trusts Law § 4-1.2, denying the appellant the right to inherit from his father is constitutional. (Appendix B) On a direct appeal to Court of Appeals of New York on constitutional grounds, the decree of Surrogate Court was affirmed.

This Court vacated the judgment of the said Court of Appeals and remanded same for further consideration in light of *Trimble* v. *Gordon*, 430 U.S. 762 (1977). (No. 75-1148) On remand the Court of Appeals adhered to previous decision.

The judgment of the Court of Appeals of New York was entered on November 17, 1977: *Department of Banking* v. *Pink* (1942) 317 U.S. 264, 267-268; *Cole* v. *Violette*, (1943) 319 U.S. 581. Notice of Appeal was filed in Surrogate's Court, Westchester County on January 6, 1978. The jurisdiction of the United States Supreme Court to review this decision on appeal is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Trimble* v. *Gordon* (1977) 430 U.S. 762. *Demorest* v. *City Bank Farmers Trust Co.* (1943), 321 U.S. 36.

Statute Involved

Estates, Powers and Trusts Law § 4-1.2, 17B, McKinney's Consolidated Laws of New York, 531-532, provides as follows:

§ 4-1.2 *Inheritance by or from illegitimate persons*

(a) For the purposes of this article:

(1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.

(2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

(3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made as prescribed by subparagraph (2).

(4) A motion for relief from an order of filiation may be made only by the father, and such motion

must be made within one year from the entry of such order.

(b) If an illegitimate child dies, his surviving spouse, issue, mother, maternal kindred and father inherit and are entitled to letters of administration as if the decedent were legitimate, provided that the father may inherit or obtain such letters only if an order of filiation has been made in accordance with the provisions of subparagraph (2).

Other Material Statutes

It is the juxtaposition of the above quoted statute with the other pertinent statutes, reflecting the public policy of New York that points up the discrimination complained of. Those statutes are:

1. Estates, Powers and Trusts Law § 5-4.4, 17B, McKinney's Consolidated Laws of New York, 932, as amended by 1975-1976 Pocket Part, page 146:

§ 5-4.4 *Distribution of damages recovered*

(a) The damages, as prescribed by 5-4.3, whether recovered in an action or by settlement without an action, are exclusively for the benefit of the decedent's distributees and, when collected, shall be distributed to the persons entitled thereto under 4-1.1 and 5-4.5, subject to the following:

(1) Such damages shall be distributed by the personal representative to the persons entitled thereto in proportion to the pecuniary injuries suffered by them, such proportions to be determined after a hearing, on application of the personal representative or any distributee, at

such time and on notice to all interested persons in such manner as the court may direct. If no action is brought, such determination shall be made by the surrogate of the county in which letters were issued to the plaintiff; if an action is brought, by the court having jurisdiction of the action or by the surrogate of the county in which letters were issued.

(2) The court which determines the proportions of the pecuniary injuries suffered by the distributees, as provided in subparagraph (1), shall also decide any question concerning the disqualification of a parent, under 4-1.4, or a surviving spouse, under 5-1.2, to share in the damages recovered.

(b) The reasonable expenses of the action or settlement and, if included in the damages recovered, the reasonable expenses of medical aid, nursing and attention incident to the injury causing death and the reasonable funeral expenses of the decedent may be fixed by the court which determines the proportions of the pecuniary injuries suffered by the distributees, as provided in subparagraph (1), upon notice given in such manner and to such persons as the court may direct, and such expenses may be deducted from the damages recovered. The commissions of the personal representative upon the residue may be fixed by the surrogate, upon notice given in such manner and to such persons as the surrogate may direct or upon the judicial settlement of the account of the personal representative, and such commissions may be deducted from the damages recovered.

(c) In the event that an action is brought, as authorized in this part, and there is no recovery or settlement, the reasonable expenses of such unsuccessful action, excluding counsel fees, shall be payable out of the assets of the decedent's estate.

2. Estates, Powers and Trusts Law § 4-1.1, 17B, McKinney's Consolidated Laws of New York, 476-477, as amended by 1975-1976 Pocket Part, pages 70-71:

§ 4-1.1 *Descent and distribution of a decedent's estate*

The property of a decedent not disposed of by will, after payment of administration and funeral expenses, debts and taxes, shall be distributed as follows:

(a) If a decedent is survived by:

(1) A spouse and children or their issue, money or personal property not exceeding in value two thousand dollars and one-third of the residue to the spouse, and the balance thereof to the children or to their issue per stirpes.

(2) A spouse and only one child, or a spouse and only the issue of one deceased child, money or personal property not exceeding in value two thousand dollars and one-half of the residue to the spouse, and the balance thereof to the child or to his issue per stirpes.

(3) A spouse and both parents, and no issue, twenty-five thousand dollars and one-half of the residue to the spouse, and the balance thereof to the parents. If there is no surviving spouse, the whole to the parents.

(4) A spouse and one parent, and no issue, twenty-five thousand dollars and one-half of the residue to the spouse, and the balance thereof to the parent. If there is no surviving spouse, the whole to the parent.

(5) A spouse, and no issue or parent, the whole to the spouse.

(6) Issue, and no spouse, the whole to the issue per stirpes.

(7) Brothers or sisters or their issue, and no spouse, issue or parent, the whole to the brothers or sisters or to their issue per stirpes.

(8) Grandparents only, the whole to the grandparents. If there are no grandparents, the whole to the issue of the grandparents in the nearest degree of kinship to the decedent per capita.

(9) Great-grandparents only, the whole to the great-grandparents. If there are no great-grandparents, the whole to the issue of great-grandparents in the nearest degree of kinship to the decedent per capita. Provided that in the case of a decedent who is survived by great-grandparents only, or the issue of great-grandparents only, such great-grandparents or the issue of such great-grandparents shall not be entitled to inherit from the decedent unless the decedent was at the time of his death an infant or an adjudged incompetent. Provided, further, that this subparagraph nine shall be applicable only to the estates of persons dying on or after its effective date.

(b) If the distributees of the decedent are in equal degree of kinship to him, their shares are equal.

(c) There is no distribution per stirpes except in the case of the decedent's issue, brothers or sisters and the issue of brothers or sisters.

(d) For all purposes of this section, decedent's relatives of the half blood shall be treated as if they were relatives of the whole blood.

(e) Distributees of the decedent, conceived before his death but born alive thereafter, take as if they were born in his lifetime.

(f) The right of an adopted child to take a distributive share and the right of succession to the estate of an adopted child continue as provided in the domestic relations law.

(g) A distributive share passing to a surviving spouse under this section is in lieu of any right of dower to which such spouse may be entitled.

3. Family Court Act § 517, 29A, Part 1, McKinney's Consolidated Laws of New York, 249:

§ 517. *Time for instituting proceedings*

(a) Proceedings to establish the paternity of the child may be instituted during the pregnancy of the mother or after the birth of the child, but shall not be brought after the lapse of more than two years from the birth of the child, unless paternity has been acknowledged by the father in writing or by furnishing support.

(b) If the petitioner is a public welfare official, the proceeding may be originated not more than ten years after the birth of the child.

4. Family Court Act § 417, 29A, Part 1, McKinney's Consolidated Laws of New York, 146:

§ 417. *Child of ceremonial marriage*

A child born of parents who at any time prior or subsequent to the birth of said child shall have entered into a ceremonial marriage shall be deemed the legitimate child of both parents for all purposes of this article regardless of the validity of such marriage.

5. Domestic Relations Law § 24, 14, McKinney's Consolidated Laws of New York, 1975-1976 Pocket Part, 28:

§ 24. *Effect of marriage on legitimacy of children*

1. A child heretofore or hereafter born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage, or shall have consummated a common-law marriage where such marriage is recognized as valid, in the manner authorized by the law of the place where such marriage takes place, is the legitimate child of both natural parents notwithstanding that such marriage is void or voidable or has been or shall hereafter be annulled or judicially declared void.

2. Nothing herein contained shall be deemed to affect the construction of any will or other instrument executed before the time this act shall take effect or any right or interest in property or right of action vested or accrued before the time this act shall take effect, or to limit the operation of any judicial determination heretofore made containing express provision with respect to the legitimacy, maintenance or custody of any child, or to affect any adoption proceeding heretofore commenced, or limit the effect of any order or orders entered in such adoption proceeding.

Question Presented

Does Estates Powers and Trusts Law § 4-1.2 providing that an illegitimate child is the legitimate child of his father only if an order of filiation is issued in a proceeding instituted in the lifetime of the father during pregnancy of the mother or within two years from the birth of a child in juxtaposition with other pertinent statutes reflecting public policy of New York violate Equal Protection and Due Process Clauses of Amendment XIV to the Constitution of the United States, in its application to a child born out of wedlock, for whom no order of filiation was entered and who was acknowledged by the deceased father as his son in a writing acknowledged before a notary and partially supported by him, by preventing such child from sharing in his father's intestate estate or proceeds of recovery in a wrongful death action against the confessed murderer of his father?

Statement

The decedent, Mario Lalli, was murdered on January 7, 1974 by one William Simpson, also known as William Lalli. He was married to Rosamond Lalli, the administratrix and appellee, about 34 years. Robert M. Lalli, the appellant, and his sister, Maureen Lalli were born respectively on August 24, 1948 and March 19, 1950, to the decedent and Eileen Lalli, who predeceased him. Robert M. Lalli, the appellant, was acknowledged by the decedent in a writing duly acknowledged before a notary and was supported by the decedent, who even bought a house "for Renee, his son Bobby, Renee's son Billy, and the other child that they were expecting."

There are no factual disputes. The appellant, Robert M. Lalli, and his sister, Maureen Lalli are natural children, born out of wedlock, and no order of filiation was ever entered.

On August 26, 1974 Robert M. Lalli, the appellant, filed a petition seeking a compulsory accounting and although the appellee originally answered, she thereafter served a notice of motion to dismiss on October 1, 1974 on the ground that under Estates, Powers and Trusts Law § 4-1.2 the appellant was not a distributee. The appellant opposed the application on the ground that the statute violated Equal Protection and Due Process Clauses of the XIVth Amendment and New York State Constitution, thus raising the federal question sought to be reviewed. The Surrogate granted the motion upholding the statute by the decree entered November 26, 1974 (Appendix D) The Court of Appeals affirmed by the final judgment entered November 25, 1975. This Court vacated said judgment and remanded for farther consideration in light of *Trimble* v. *Gordon,* 430 U.S. 762 (1977). On remand the Court of Appeals adhered to its prior decision by final judgment entered November 17, 1977.

The Federal Questions Are Substantial

The XIV Amendment reads in part as follows:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws * * *"

This Court in *Trimble* v. *Gordon,* 430 U.S. 762, 770-771, said:

> "We think, however, that the Illinois Supreme Court gave inadequate consideration to the relation

between § 12 and the State's proper objective of assuring accuracy and efficiency in the disposition of property at death. The Court failed to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestate laws. Because it excludes these categories of illegitimate children unnecessarily, § 12 is constitutionally flawed."

In addition this Court clearly indicated acceptable guidelines, saying:

> "Evidence of paternity may take a variety of forms, some creating more significant problems of inaccuracy and inefficiency than others. The states, of course, are free to recognize these differences in fashioning their requirements of proof. Our holding today goes only to those forms of proof which do not compromise the State's interests. This clearly would be the case, for example, where there is a prior adjudication or formal acknowledgement of paternity. Thus, we would have a different case if the state statute were carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity (430 U.S. 772N. 14)"

In our case the fact pattern fits into the guidelines for we have an acknowledgment of paternity in writing duly acknowledged before a notary.

Yet the Court of Appeals, 5 to 2, contrary to the meaning of the language of this Court, persists in its extreme position that failure to secure an order of filiation imposes an impenetrable barrier and completely ignores reference by this Court to an acknowledgement, as is the fact in our case.

The dissenting opinion of Mr. Justice Cooke, joined in by Mr. Justice Fuchsberg (Appendix A) clearly expresses our position:

> "Our Statute considers no alternatives and imposes a sine qua non requirement that an order of filiation be obtained during the lifetime of the father (EPTL 4-1.2, sub [a] par [2]). For this reason, in light of Trimble, our statute fails to pass constitutional muster."

Furthermore, New York Statutes are not carefully tailored. On one hand under Domestic Relations Law sec. 24 a child born before or after a marriage is given all rights of a legitimate child even though the marriage is void or voidable whereas as to another child whose parents did not have a marriage ceremony there is provided no middle ground by Section 4-1.2 Estates, Powers and Trust Law. Certainly proof of a marriage after birth of a child is a much more inaccurate and inefficient way to establish paternity than an acknowledgement in writing duly acknowledged before a notary. There is no reason for the discrepancy except hostility to illegitimates.

Furthermore, under Section 517 of the Family Court Act New York legislature does recognize acknowledgement of paternity or support as sufficient to eliminate time bar to paternity proceedings. It is respectfully submitted that having considered either as sufficient for some purposes, it is not rational to consider both as in our case insufficient as proof of paternity.

CONCLUSION

For the reasons stated, appellant respectfully submits that the questions presented on this appeal are so substantial as to require reversal of the judgment below or plenary consideration, with briefs on the merits and oral arguments, for their resolution.

Respectfully submitted,

HENKIN AND HENKIN
Counsel for Appellant

Of Counsel:
MORRIS R. HENKIN
LEONARD M. HENKIN

Appendices

APPENDIX A

Opinion of New York Court of Appeals

STATE OF NEW YORK COURT OF APPEALS

SURROGATE COURT

No. 560

In the Matter of

ROBERT M. LALLI,

Appellant,

vs.

ROSAMOND LALLI, as Administratrix &c of Mario Lalli, Deceased,

Respondent.

(560)

MORRIS R. HENKIN & LEONARD M. HENKIN,
Mt. Vernon,
for appellant,

LEONARD A. WEISS,
Mt. Vernon,
for respondent.

JONES, *J.*

This case is now before us on remand from the Supreme Court of the United States for further consideration in the light of *Trimble* v. *Gordon* (430 U.S. ——). We adhere to our previous decision (38 N.Y.2d 77).

At the outset we observe that the standard to be applied in our review, while "less than strictest scrutiny", is nonetheless "not a toothless one" (perhaps in the sense that it

would be a "toothless" standard if it could be satisfied by a mere finding of some remote rational relationship between the statute and a legitimate state purpose) (430 U.S. ——).

We find the Illinois statute which was before the Court in *Trimble* significantly and determinatively different from the New York statute. Under the former the right of an illegitimate child to inherit from his father depended not only on proof, by way of the father's acknowledgement, of the fact of paternity, but on proof as well that the parents had intermarried (Ill. Rev. Stat. ch 3, § 12 [1961]; cf. Ill. Rev. Stat. ch 3, § 2-2 [1976-1977 Supp.]). By contrast, under our New York statute the right to inherit depends only on proof that a court of competent jurisdiction has made an order of filiation declaring paternity during the lifetime of the father (Estates, Powers and Trusts Laws. § 4-1.2, subd [a], par [2]).[1]

In our analysis the Illinois statute focuses on a requirement that the family relationship be "legitimatized" by the subsequent marriage of the parents. Thus, there was a manifested and impermissible hostility to illegitimacy as such, unrelieved even if there were no doubt whatsoever as to paternity.[2] The Supreme Court held unacceptable

[1] As we noted when this case was initially before us, inasmuch as we uphold that provision of the statute which forecloses this appellant's claim to status as a distributee because no order of filiation was made during the lifetime of his father, we do not reach or consider the challenge to the separate clause of our statute which requires that the paternity proceeding have been instituted "during the pregnancy of the mother or within two years from the birth of the child" (EPTL 4-1.2, subd [a], par [2]; 38 NY2d 80, fn).

[2] We observe that this appears to have been the case in *Trimble* itself. A paternity order had been entered during the lifetime of the father finding Gordon to be the father of the child, Deta Mona (430 US ——). On the facts there would have been no question but what Deta Mona would have been entitled to inhert from her father under the New York statute.

such a statutory provision which penalized children born of an "illegitimate relationship" between their parents—concluding that the sins of the parents are not to be visited upon their children. There is nothing similar in our statute; it is concerned only with proof of paternity and the establishment of a blood relationship between the father and the child.

In another aspect we note that even with respect to the issue of paternity there is a different emphasis in the two statutes. Illinois requires in a conclusory form only that the child be "acknowledged by the father as the father's child". New York, on the other hand, is evidently concerned not only with the fact of paternity but with the form and manner, and thus the availability, of its proof, i.e., by order of filiation.

The Supreme Court explicitly recognized the inherently more difficult problems of proof of paternity than of maternity and acknowledged that the states have a legitimate interest in making provision for the orderly settlement of estates and the dependability of titles to property passing under intestacy laws (430 U.S.).

> "The orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual States. In exercising this responsibility, a State necessarily must enact laws governing both the procedure and substance of intestate succession. Absent infringement of a constitutional right, the federal courts have no role here, and, even when constitutional violations are alleged, those courts should accord substantial deference to a State's statutory scheme of inheritance." (430 U.S.).

The issue here appears to turn, then, on whether a state may constitutionally require as proof of paternity a judicial determination made during the lifetime of the father. We find nothing in *Trimble* which forecloses this possibility; specifically we do not, as appellant would have us, read footnote 14 at page as forbidding such a requirement The preference for judicial determinations with respect to title to real property has a long and respected history and provides an available record. In effect our statute requires that the determination of paternity be made in the formality of a judicial proceeding in consequence of which there will follow an order of filiation and a permanent, accessible record. If a father is prepared to execute a formal acknowledgment of paternity (a prerequisite which appears clearly to be acceptable to the Supreme Court), obtaining an order of filiation will not be burdensome. Nor do we perceive the seeds of constitutional infirmity in the requirement that the judicial determination be made within the lifetime of the father. As we noted before, the father "may be expected to have a greater personal knowledge than anyone else, save possibly the mother, of the fact or likelihood that he was indeed the natural father. His availability should be a substantial factor contributing to the reliability of the fact-finding process." (38 NY2d 82.) Indeed a formal acknowledgment of paternity, apparently found in *Trimble* to be an acceptable requirement, obviously entails personal participation by the father during his lifetime.

Finally, we would merely note, if *Trimble* is to be read as inviting exploration of the intent of the Legislature in adopting the particular statute, that research of counsel as well as our own has disclosed no relevant materials with respect to the enactment of § 4-1.2(a)(2). We could speculate as to the details of legislative intentions, and so could

others. To us it is clear, even in the absence of specific legislative materials, that this statute serves a legitimate state purpose—in the language of *Trimble,* to make provision for "the orderly settlement of estates and the dependability of titles to property passing under intestacy laws". We know of nothing, and there is nothing in the record, to suggest that our statute was intended as a moral, ethical or social disparagement of illegitimacy or was the product of proponents whose objective, even in small part, was to discourage illegitimacy, to mold human conduct or to set societal norms.

For the reasons stated we conclude that our statute meets the constitutional guidelines articulated in *Trimble.* Accordingly, the decree of Surrogate's Court, Westchester County, should be affirmed, with costs.

COOKE, *J.* (dissenting):

Admittedly, the Illinois statute recently declared unconstitutional by the Supreme Court of the United States is significantly different from the New York statute (EPTL, 4-1.2, subd [a], part [2]). Nevertheless, it is respectfully submitted that our statute is likewise unconstitutional in light of *Trimble* v. *Gordon* (430 U.S. 762).

In *Trimble,* the Supreme Court was careful to delineate the boundaries of its inquiry, thus explaining that

> The orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual States. In exercising this responsibility, a State necessarily must enact laws governing both the procedure and substance of intestate succession. Absent infringement of a con-

> stitutional right, the federal courts have no role here, and, even when constitutional violations are alleged, those courts should accord substantial deference to a State's statutory scheme of inheritance (430 U.S. at p. 771).

The Court also recognized that "[t]he more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally" (Id. at p. 770). Nevertheless, considering the Illinois statute, the court reasoned:

> We think, however, that the Illinois Supreme Court gave inadequate consideration to the relation between § 12 and the State's proper objective of assuring accuracy and efficiency in the disposition of property at death. The court failed to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws. Because it excludes those categories of illegitimate children unnecessarily, § 12 is constitutionally flawed (Id. at pp. 770-771).

Furthermore, concerning the interests of the states in the accurate and efficient disposition of property, the Court commented:

> Evidence of paternity may take a variety of forms, some creating more significant problems of inaccuracy and inefficiency than others. The states, of course, are free to recognize these differences in fashioning their requirements of proof. Our holding today goes only to those forms of proof which do not compromise the States' interests. This clearly would be the case, for example, where there is a prior adjudication or formal acknowledgment of paternity. Thus, we would have a different case if the state statute were carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity (430 U.S. at p. 772, n. 14).

Applying the equal protection analysis employed by the Supreme Court in *Trimble* necessitates consideration of the relation of our statute to our State's "proper objective of assuring accuracy and efficiency in the disposition of property at death" (430 U.S. at p. 770). Of course, our statute is not mindless nor totally irrational and a concern for solid proof of paternity is a legitimate state purpose. But if the court is now required to put teeth into its scrutiny, we are obliged to go beyond the purpose of the statute to a consideration of the rationality of the burden it places on the State's illegitimate children.

A judicial proceeding may promote accuracy, but the difficulties in otherwise establishing paternity do not justify the narrow confines and procedure mandated by our statute. The requirement of an order of filiation made during the lifetime of the father will, *ipso facto*, exclude a substantial category of illegitimate children from inheritance. If this exclusion resulted from a lack of proof, it might be justifiable. But in reality not obtaining an order of filiation will often result simply from the fact that the putative father is supporting and acknowledging the children as

his own. Or, it might well be and often is the product of carelessness or ignorance on the part of those who might institute a proceeding within the statutory limitation, for neither of which should a child suffer. Indeed, ordinarily the order will be obtained only where the natural father is not providing support. The children who are voluntarily supported, no matter how compelling the proof, will be absolutely barred if such an order is not obtained.

The question of paternity is a delicate one. Even though the putative father may petition for the order (see Family Court Act, § 522), this is a burdensome procedure. To require an order of filiation during the lifetime of the father is to demand, at least in the eyes of laymen, a form of adversary proceeding. The instant matter is illustrative. The natural father was supporting petitioners, and had made an acknowledgment of his parenthood as to one of them. In this instance the only purpose served by an order of filiation would be to satisfy a requirement which may have provoked disharmony and which goes beyond what is necessary in these circumstances. To be sure, the State may desire this method of proof, but this is an extreme requirement in view of the consequences. The State may impose a heavy burden, but the statutory procedure required has only a tenuous relation to the quantum of proof demanded. Viewed in proper perspective, it is apparent that the statute places an undue, if not unyielding, burden on those concerned, and thus in light of *Trimble* it must be concluded that the statute leaves the "middle ground" of what a state may legitimately require and settles on the side of complete exclusion.

In *Trimble,* the Supreme Court reasoned that a paternity order obtained for purposes of requiring the father to provide support should be sufficient to establish paternity

for purposes of allowing an illegitimate child to inherit from a father who dies intestate (see 430 U.S. at p. 772).* However, the Court did not suggest that this is the only method for making this determination. Our statute considers no alternatives and imposes a sine qua non requirement that an order of filiation be obtained during the lifetime of the father (EPTL, 4-1.2, subd [a], par [2]). For this reason, in light of *Trimble,* our statute fails to pass constitutional muster.

Accordingly, if paternity is established, the petition for an accounting should be granted.

* * * *

Upon reargument: Prior determination of this court affirming the decree of the Surrogate's Court adhered to, with costs. Opinion by Jones, J. All concur except Cooke, J., who dissents and votes to reverse in an opinion in which Fuchsberg, J., concurs.

Decided November 17, 1977

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* This pronouncement by the Supreme Court warrants this observation. This Court does not "reach or consider the challenge to the separate clause of our statute which requires that the paternity proceeding have been instituted 'during the pregnancy of the mother or within two years from the birth of the child' " because in this matter no order of filiation was made during the lifetime of the father (see slip opn, p 2, n 1). Nevertheless, it is difficult to ignore the fact that under our statutory scheme a public welfare official may institute a proceeding within 10 years of the birth of the child (Family Court Act, § 517, subd [b]) for purposes of requiring the father to provide support, and yet the order of filiation emanating from such proceeding would not allow the child to inherit from his or her father unless said proceeding was instituted within two years of the birth of the child (EPTL, 4-1.2, subd [a], par [2]; see *Matter of Flemm,* 85 Misc2d 855, 862).

APPENDIX B

Opinion of Surrogate's Court Westchester County

SURROGATE'S COURT

WESTCHESTER COUNTY

In the Matter of the Petition of

ROBERT M. LALLI to compel ROSAMOND LALLI as the Administratrix of the Estate of

MARIO LALLI,

Deceased,

to render and settle her accounts as such Administratrix.

HENKIN, HENKIN & QUINN,
Attorneys for Petitioner

MURIEL LAWRENCE,
Attorney for Respondent

BREWSTER—S.

This is a motion to dismiss a petition for a compulsory accounting on the ground that the petitioner, an illegitimate person, has no status as a distributee to compel an accounting. Petitioner attacks the constitutionality of the statute on descent and distribution of a decedent's intestate property as it applies to illegitimate issue on the grounds that it is a denial of equal protection under the Constitution of the United States (Fourteenth Amendment) and the Constitution of the State of New York (Article I, §11).

Decedent died on January 7, 1973. The mother of petitioner predeceased the decedent. The constitutional issue was initially raised on the application by an alleged son for letters of administration. However, no determination was made at that time since the widow who had a prior right to letters, duly qualified and was appointed administratrix on December 26, 1973.

The petitioner in this compulsory accounting proceeding states that he and his sister are children of decedent; were born out of wedlock; and that filiation proceedings were neither instituted nor any order of filiation declaring paternity ever made at any time on behalf of either of them. They do state, however, that they were supported, in part, by the decedent during his lifetime. Petitioner and his sister claim to be lawful distributees of the decedent together with decedent's widow. They further claim that EPTL §4-1.2(2) which would deny them a share in the estate of decedent as distributees by reason of their illegitimacy without an order of filiation having been made during the life of the father declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child, is unconstitutional and therefore void. The motion by the administratrix to dismiss the petition relies on the constitutionality of the aforesaid statute, asserting that even if the proof is offered which establishes that decedent was the father of petitioner and his sister or contributed to their support, nevertheless they are not distributees by virtue of the statute and petitioner has no status to compel an accounting by the administratrix.

This is not a novel issue. The exclusion of illegitimates, as distributees under various state statutes has already

been considered by the courts. In recent years the United States Supreme Court has on three separate occasions considered the constitutionality of the complex set of rules regarding the rights of illegitimate children in the statutes of the State of Louisiana. In the case of Levy v. Louisiana, 391 U. S. 68, the denial of the right of an illegitimate child to recover damages for the wrongful death of his mother was declared unconstitutional. In a second case, Glona v. American Guarantee, 391 U. S. 73, the Louisiana statute that denied the right of a mother to recover damages for the wrongful death of her illegitimate child was also declared unconstitutional. Next was decided the case of Labine v. Vincent, 401 U. S. 532, in which the right of the State of Louisiana to make laws for distribution of property, even to the exclusion of illegitimates, was upheld as constitutional. After considering the restrictive provisions under Louisiana law with respect to illegitimates, the Court held:

> "These rules for intestate succession may or may not reflect the intent of particular parents. Many will think that it is unfortunate that the rules are so rigid. Others will think differently. But the choices reflected by the intestate succession statute are choices which it is within the power of the State to make. The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules. Of course, it may be said that the rules adopted by the Louisiana Legislature 'discriminate' against illegitimates. But the rules also discriminate against collat-

eral relations, as opposed to ascendants, and against ascendants, as opposed to descendants.

• • • • •

"It may be possible that some of these choices [of distribution of an intestate's property] are more 'rational' than the choices inherent in Louisiana's categories of illegitimates. But the power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State. • • • We cannot say that Louisiana's policy provides a perfect or even a desirable solution or the one we would have provided for the problem of the property rights of illegitimate children. Neither can we say that Louisiana does not have the power to make laws for distribution of property left within the State." Labine v. Vincent, supra, pp. 537-539.

The New York law on inheritance by or from illegitimate persons is set forth in EPTL §4-1.2 which provides in part as follows:

"(a) For the purposes of this article:

"(1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.

"(2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation

declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

"(3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made as prescribed by subparagraph (2).

"(4) • • • • • •"

This statute has been somewhat eroded by constitutional attacks made upon some of its provisions as applicable to certain types of cases. In so far as the statute would limit and restrict the rights of illegitimate children who have suffered pecuniary injuries to share in the distribution of damages recovered in an action for the wrongful death of their putative father, it has been declared unconstitutional (Matter of Ortiz, 60 Misc 2d 756). But even in the Ortiz case it was pointed out that the Legislature may in its absolute discretion designate one class of beneficiaries to inherit and another class to receive the damages for wrongful death. Referring to the equal protection clauses of the U. S. Constitution (Fourteenth Amendment) and the Constitution of the State of New York (Article I §11) the court said:

"These provisions do not forbid unequal laws and do not require every law to be equally applicable to all persons (Barbier v. Connolly, 113 U. S. 27). Equal protection only requires that a statute operate equally upon all members of the group provided the group is defined reasonably—reasonably being measured in terms of a proper legislative purpose." p 759.

Perceiving a rational legislative purpose in discriminating between a child-father relationship which is not present in the child-mother relationship, the court further stated:

"But some difference does exist in such relationships at least with respect to the greater difficulty in ascertaining paternity. The putative father often goes his way unconscious of the birth of a child. Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother. Indeed the mother may not know *who* is responsible for her pregnancy. To the mother however, the birth of the child is a recorded or registered event usually taking place in the presence of others. In most cases the child remains with the mother and for a time is necessarily reared by her. That the child is a child of a particular woman is rarely difficult to prove. Proof of paternity on the other hand as experience has shown is a much more difficult problem.

• • • • •

"It is not difficult to perceive a rational purpose in excluding illegitimates in a statute governing intestate *inheritance* from the father. In such a statute the illegitimates' rights often come into direct conflict with those of a spouse and legitimate children. Recognition of the illegitimate automatically diminishes the share of such other next of kin." Matter of Ortiz, supra, p. 761.

The constitutionality of the restrictions limiting illegitimates to inherit from their father in certain cases only was considered in Matter of Crawford, 64 Misc 2d 758. The court stated at page 763:

". . . It is urged that this limitation creates an arbitrary classification as to infants, where there is no filiation order within two years from the date of birth. The test to be applied 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without much basis.' (Truax v. Corrigan, 257 U. S. 312, 337; Matter of Posner v. Rockefeller, 31 A D 2d 352.)

"The limitations upon the right of an illegitimate child to inherit from its father are set forth in absolute fashion in the statute. The two-year limitation provision is not akin to the Statute of Limitations found in section 517 of the Family Court Act but rather it establishes a 'rule of substantive law, a statute prerequisite • • • a condition precedent' to the qualification of the infant as a distributee under EPTL 4-1.2.

"The legislative intent is clear on this point: 'Since inheritance from the father of an illegitimate has always been intertwined with proof of paternity, it is recommended that only a limited right of inheritance from the father be permitted. The child is only permitted to inherit from the father where a court of competent jurisdiction (which under present law in most cases will be the Family Court) has made an order declaring paternity during the lifetime of the father in a proceeding commenced within two years after the birth of the child.' (Fourth Report of Temporary State Comm. on Law of Estates, 1965, p. 37; N. Y. Legis. Doc., 1965, No. 19.)

"Such limitations are not arbitrary or capricious, but were adopted by the Legislature to avoid post-

death litigation. (Matter of Consolazo, 54 Misc 2d 398; Matter of ABC v. XYZ, 50 Misc 2d 792; Matter of Middlebrooks v. Hatcher, 55 Misc 2d 257.)"

Matter of Hendrix, 68 Misc 2d 439 considered anew the constitutionality of EPTL §4-1.2 and after a full discussion of the many cases involving the same concluded "that the New York statute requiring a reasonable substantiation of the claim of paternity does not impose an improper condition and does not result in a discrimination constituting a denial of equal protection of the law to an illegitimate". p. 444. In Matter of Bolton, 70 Misc [2] 814, the court reconsidered the statute anew, reaffirmed its constitutionality and despite the fact that decedent had admitted paternity in an affidavit, it held that only full compliance with the provisions of EPTL §4-1.2 could entitle an illegitimate child to inherit from the putative father. The court stated: "It is for the Legislature and not the court to overcome the restrictive elements of this statute." p. 819.

Cases involving wrongful death cited by the petitioner in which limiting provisions of the statute were voided as unconstitutional are not determinative of the issue here. As pointed out by the court in Labine v. Vincent, supra, p. 536:

> "The cause of action alleged in Levy was in tort. The court held that the state could not totally exclude the illegitimate children who were unquestionably injured by the tort. Levy did not say that a state can never treat an illegitimate child differently from legitimate offspring."

The Supreme Court of New Jersey clearly pointed out the distinguishing elements in the claims of illegitimates to damages for wrongful death of a putative father as opposed to inheritance from a decedent. In Schmoll v. Creecy, 54 N. J. 194, the court stated:

> ". . . There are of course differences between a wrongful death statute and an inheritance statute. A wrongful death statute itself determines who shall benefit, and the decedent has no voice in the matter. On the other hand, an inheritance statute embodies no more than the presumed intention of decedents who do not express their wish. It may therefore be urged that our inheritance statute does not generate a distinction between legitimate and illegitimate children but merely reflects the probable intent of individuals who are themselves constitutionally free to draw that line and who presumptively subscribe to the view of the statute by omitting to direct otherwise by will. Then, too, at least in the case of a male decedent, there is fear of spurious claimants, a problem more formidable in estate situations than in wrongful death actions in which the amount of the recovery will depend critically upon the amount of pecuniary injury shown."

Finally, the court observes that while the limitation in EPTL §4-1.2 on bringing an action to declare paternity within two years from the birth of the child has been declared unconstitutional as an irrational discrimination between two classes of individuals, namely public welfare officials and others (Wales v. Gallan, 61 Misc. 2d 831), nevertheless the requirement that it be done during the lifetime of the father, giving him a chance to contest the same, is

obviously a rational requirement and constitutionally sound. The attempt to prove paternity at this date comes too late.

Accordingly, the court determines that EPTL §4-1.2 is applicable to the alleged son of decedent, that he is not a distributee of the decedent herein and that he lacks status to petition for a compulsory accounting by the administratrix. The motion to dismiss is granted.

Settle order.

November 15, 1974

EVANS V. BREWSTER
Surrogate

APPENDIX C

Order of Affirmance of New York Court of Appeals

COURT OF APPEALS—STATE OF NEW YORK

THE HON. CHARLES D. BREITEL,
Chief Judge, Presiding

No. 560

—o—

In the Matter of

Robert M. Lalli,

Appellant,

vs.

Rosamond Lalli, as Administratrix &c. of Mario Lalli, Deceased,

Respondent.

—o—

The appellant in the above entitled appeal appeared by Henkin & Henkin; the respondent appeared by Avstreih, Martino & Weiss; and Louis J. Lefkowitz, Attorney General of the State of New York.

The Court, after due deliberation, orders and adjudges that upon reargument: Prior determination of this court affirming the decree of the Surrogate's Court adhered to, with costs. Opinion by Jones, J. All concur except Cooke, J., who dissents and votes to reverse in an opinion in which Fuchsberg, J., concurs.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Surrogate Court, Westchester County, there to be proceeded upon according to law.

Appendix C

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

Court of Appeals, Clerk's Office, Albany,
November 17, 1977

APPENDIX D

Decree of Surrogate's Court Westchester County

At the Surrogate's Court, held in and for the County of Westchester, at the County Courthouse, White Plains, New York, on the 26th day of November 1974.

Present:

HON. EVANS V. BREWSTER,
Surrogate.

Index #1760/73

In the Matter of the Petition of ROBERT M. LALLI to compel ROSAMOND LALLI as the Administratrix of the estate of Mario Lalli, deceased, to render and settle her accounts as such Administratrix.

ROBERT M. LALLI, residing at 135 Daisy Farm Drive, in the City of New Rochelle, County of Westchester, State of New York, having petitioned the Surrogate's Court of the County of Westchester to compel Rosamond Lalli, Administratrix of the goods, chattels and credits of Mario Lalli, deceased, who at the time of his death resided at 415 Gramatan Avenue, in the City of Mount Vernon, County of Westchester, to render and settle her account as such Administratrix, by a petition duly verified August 23, 1974, and a citation having duly issued thereon returnable on the 20th day of September, 1974, and said Rosamond Lalli having answered said petition by an answer duly verified September 16th, 1974, and having thereafter moved by a

notice of motion dated October 1, 1974, supported by the affidavit of Rosamond Lalli sworn to October 1, 1974, to dismiss the petition of said Robert Lalli on the ground that neither Robert Lalli nor his sister, Maureen Lalli, are distributees of decedent's estate under provisions of EPTL 4-1.2 and the petitioner having submitted an affidavit sworn to October 10, 1974, together with exhibits thereto attached, and affidavit of Rosetta Vollmer Ammirata sworn to October 10, 1974, in opposition thereto, and said Rosamond Lalli having submitted a reply affidavit sworn to October 23, 1974, and said application having come up to be heard on the 25th day of October, 1974, and after hearing Muriel Lawrence, Esq., attorney for the respondent, in support of the application, and Henkin, Henkin and Quinn, Esqs. (Leonard M. Henkin, Esq. of counsel), attorneys for the petitioner, in opposition thereto, and upon reading all of the aforesaid and due deliberation having been had, and the Surrogate having rendered a decision dated November 15, 1974, sustaining the constitutionality of EPTL 4-1.2 in its application to the petitioner and his sister herein, as against their claim that said section is unconstitutional, in application to them

Now, it is

ORDERED, ADJUDGED AND DECREED, that EPTL 4-1.2 is constitutional as applicable to the petitioner herein, and that by reason thereof petitioner is not a distributee of the decedent herein and that he lacks status to petition for compulsory accounting by the Administratrix, and it is further

ORDERED, ADJUDGED AND DECREED, that the petition herein be and the same is hereby dismissed.

EVANS V. BREWSTER
Surrogate

APPENDIX E

Notice of Appeal to United States Supreme Court

SURROGATE'S COURT

WESTCHESTER COUNTY

No. 560

—o—

In the Matter of the Petition of

ROBERT M. LALLI,

Appellant,

To Compel ROSAMOND LALLI as Administratrix of the Estate of MARIO LALLI, Deceased,

Appellee,

TO RENDER AND SETTLE HER ACCOUNT AS SUCH ADMINISTRATRIX.

—o—

NOTICE is hereby given that ROBERT M. LALLI, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals, State of New York, affirming the decree of Surrogate's Court, Westchester County, dismissing the petition for a compulsory accounting and adjudging that Estates Powers and Trusts Law § 4-1.2 is constitutional, entered on November 17, 1977.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

HENKIN AND HENKIN
Attorneys for Appellant
22 West First Street
Mount Vernon, New York 10550
(914) 668-2300

Appendix E

(Filed Surrogate's Court Jan. 6, 1978
Westchester County Clerk)

STATE OF NEW YORK
COUNTY OF WESTCHESTER
SURROGATE'S OFFICE } ss:

I, Philip E. Pugsley, Chief Clerk of the Surrogate's Court of said County, do hereby certify that I have compared the foregoing copy of Notice of Appeal, Re: The Estate of Mario Lalli, Deceased. Filed: January 6, 1978 with the original thereof now remaining in this office, and have found the same to be a correct transcript therefrom, and of the whole of such original.

Dated and Sealed January 6, 1978

PHILIP E. PUGSLEY
Philip E. Pugsley
Chief Clerk of the
Surrogate's Court

[SEAL]

Affidavit of Service

STATE OF NEW YORK
COUNTY OF WESTCHESTER } ss.:

LUCILLE GREENBERG, being duly sworn, deposes and says, that she is not a party to the action, is over 18 years of age and resides at 93 Beaumont Circle, Yonkers, New York, that on January 6, 1978, deponent served the within Notice of Appeal to United States Supreme Court upon

1) Avstreih, Martino & Weiss

2) Muriel Lawrence
Esqs., Attorneys for Respondent

3) Honorable Louis J. Lefkowitz, Attorney General of the State of New York, Irwin M. Strum, Assistant Attorney General

by depositing a true copy of same enclosed in a post paid properly addressed wrapper in a post-office or official depository under the exclusive care and custody of the United States Postal service within the State of New York, with the postage thereon prepaid addressed to said attorneys at their office

1) 20 East First Street
Mount Vernon, New York 10550
(Substituted Attorneys on Appeal for Respondent)

2) 19 Gramatan Avenue
Mount Vernon, New York 10550
(Original Attorney for Respondent)

3) Two World Trade Center
New York, New York 10047
(Department of Law)

Affidavit of Service

that being the addresses designated on the last papers served by said attorneys.

LUCILLE GREENBERG
Lucille Greenberg

Sworn to before me this 6th
day of January, 1978

MORRIS R. HENKIN
Morris R. Henkin
Notary Public, State of New York
No. 60-6573350
Qualified in Westchester County
Commission Expires March 30, 1978